



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 8
999 18TH STREET - SUITE 300
DENVER, CO 80202-2466
<http://www.epa.gov/region08>

June 9, 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ref: 8ENF-L

Lee Poole
Joe Vujovich
Moonlight Basin Ranch Inc.
Moonlight Basin Ranch Limited Partnership
P.O. Box 1369
Ennis, MT 59729

Re: Findings of Violation and
Administrative Order for
Compliance
Docket No. **CWA-08-2004-0046**

Dear Mr. Vujovich and Mr. Poole:

Based on our review of all available information, the United States Environmental Protection Agency (EPA) has determined that you are in violation of the Clean Water Act, as amended (CWA). The CWA requires that an authorizing permit be obtained from the United States Army Corps of Engineers prior to the discharge of pollutants (i.e., dredged or fill material) into waters of the United States. See, 33 U.S.C. § 1311. Waters of the United States include both surface waters and wetlands as defined by 33 C.F.R. § 328.3.

Specifically, you have discharged dredged and fill material into waters of the United States without authorization under the CWA. These discharges of pollutants into streams and wetlands occurred in Sections 14, 23 and 24 in Township 6 South, Range 2 East, in Madison County, Montana.

Enclosed is an EPA Region 8 administrative order which specifies the nature of the violations and describes actions necessary in order for you to achieve compliance with the CWA. EPA's authority for such action is provided under section 309(a)(3) of the CWA, 33 U.S.C. § 1319(a)(3). The order requires you to inform EPA in writing, within five days of receipt, of your intent to fully comply with the order.



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The CWA requires the Administrator of EPA to take all appropriate enforcement action necessary to secure prompt compliance with the CWA and any order issued thereunder. Section 309 of the CWA authorizes a variety of possible enforcement actions, including filing of a civil or criminal action, administrative penalty action, and/or debarment from Federal contracts and/or loans for any noncompliance with the CWA or an order issued pursuant to the CWA. Please be advised that the issuance of this order does not preclude civil or criminal actions in the U.S. District Court pursuant to sections 309(b) or (c) of the CWA, 33 U.S.C. §§ 1319(b) or (c), or assessment of civil penalties pursuant to sections 309(d) or (g) of the CWA, 33 U.S.C. §§ 1319(d) or (g), for the violations cited in the order.

EPA has agreed to notify small businesses of their right to comment on regulatory enforcement activities at the time of an Agency enforcement activity pursuant to the Small Business Regulatory Enforcement and Fairness Act (SBREFA). SBREFA does not eliminate your responsibility to comply with the Act or this order, nor does it create any new rights or defenses under law. We have enclosed a SBREFA information sheet containing further information on compliance assistance resources and tools available to small businesses.

Please review the order carefully. If you have any questions, the most knowledgeable people on my staff are Wendy Silver, Enforcement Attorney, at 303-312-6637 and Kristine Knutson, Environmental Scientist, at 406-457-5021.

Sincerely,

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

Enclosures

1. Findings of Violation and Administrative Order for Compliance
2. SBREFA Information Sheet

cc: Tina Artemis, EPA, Regional Hearing Clerk, w/enclosures
Allan Steinle, U.S. Army Corps of Engineers, w/enclosures
David L. LaGrone, U.S. Army Corps of Engineers, w/enclosures
John Arrigo, Montana Department of Environmental Quality, w/enclosures

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

IN THE MATTER OF:)	
)	
Moonlight Basin Ranch Inc. and)	FINDING OF VIOLATION
Moonlight Basin Ranch Limited Partnership)	AND ADMINISTRATIVE
P.O. Box 1369)	ORDER FOR COMPLIANCE
Ennis, MT 59729)	
)	Docket No. CWA-08-2004-0046
Respondents.)	

I. STATUTORY AUTHORITY

This Findings of Violation and Administrative Order for Compliance (“Order”) is issued pursuant to the authority vested in the Administrator of the United States Environmental Protection Agency (“EPA”) by section 309 of the Clean Water Act (“CWA” or the “Act”), 33 U.S.C. § 1319. This authority has been properly delegated to the Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, EPA Region 8. The Order is based on the findings of violation of section 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a), which, among other things, prohibits the discharge of pollutants (*i.e.*, dredged or fill material) into waters of the United States except in compliance with a permit issued pursuant to section 404 of the CWA, 33 U.S.C. § 1344.

II. FINDINGS OF VIOLATION

1. Respondent Moonlight Basin Ranch, Inc. (MBRI) is a Montana corporation incorporated under the laws of the State of Ohio in 1992. MBRI has offices located at 117 East Main Street, Ennis, Montana.

2. Respondent Moonlight Basin Ranch Limited Partnership (MBRLP) is a Montana corporation incorporated under the laws of the State of Ohio in 1992. MBRLP has offices located at 117 East Main Street, Ennis, Montana.

3. At all relevant times, Respondents MBRI and MBRLP owned, controlled, and/or operated approximately twenty-five thousand acres of property containing wetlands and other waters of the United States in Madison County, Montana. These waters are specifically located in portions of sections 14, 23 and 24, Township 6 South, Range 2 East (hereafter, the “Site”). A residential development and ski resort known as Moonlight Basin are located at the Site.

4. On May 2, 2002, personnel from the U.S. Army Corps of Engineers (“Corps” or “COE”) met with representatives of Respondents and their technical consultants to explain the CWA regulatory process.

5. On July 23, 2002, the COE and EPA conducted a field inspection at the Site and met with Respondents to explain CWA regulations. During the field inspection, the COE and EPA discovered that there had been unauthorized discharges of dredged or fill material associated with the installation of three culverts associated with an access road. The fill affected approximately 0.08 acres of jurisdictional waters of the United States.

6. On August 1, 2002, the COE issued an after-the-fact Nationwide Permit 39 for the unauthorized fills discovered on July 23, 2002.

7. On August 29, 2002, the COE authorized three culverts for ski runs under Nationwide Permit 42 and a temporary wetland fill for an access road during timber harvest under Nationwide Permit 33.

8. During the fall of 2002, Respondents filled or caused to be filled a total of approximately 0.233 acres of jurisdictional wetlands and intermittent streams during road and ski run construction at nineteen different locations at the Site without a Department of the Army permit, as required by section 404 of the CWA, 33 U.S.C. § 1344.

9. On October 2, 2003, EPA and the COE visited the Site and viewed many of the unauthorized fills.

10. On October 7, 2003, the COE issued a Cease and Desist Order to Respondents notifying them that the discharges that occurred during the fall of 2002 were not authorized.

11. Respondents MBRI and MBRLP are each a “person” within the meaning of section 502(5) of the CWA, 33 U.S.C. § 1362(5).

12. The dredged and fill material discharged in the course of activities described in paragraph 8 above is a “pollutant” within the meaning of section 502(6) of the CWA, 33 U.S.C. §1362(6).

13. The tracked excavator, dozer, and skidder used to perform the activities described in paragraph 8, above, are each a “point source” within the meaning of section 502(14) of the CWA, 33 U.S.C. § 1362(14).

14. The wetlands and intermittent streams described in paragraph 8, above, are “waters of the United States” within the meaning of 33 C.F.R. § 328.3(a) and therefore “navigable waters” within the meaning of section 502(7) of the CWA, 33 U.S.C. § 1362(7).

15. Respondents’ activities as described in paragraph 8, above, constitute the “discharge of a pollutant” within the meaning of section 502(12) of the CWA, 33 U.S.C. § 1362(12).

16. Section 301(a) of the CWA, 33 U.S.C. § 1311, prohibits, among other things, the discharge of a pollutant by any person into water of the United States, unless authorized by a permit issued under section 404 of the CWA, 33 U.S.C. § 1344.

17. Respondents are not and never have been authorized by a permit issued under section 404 of the CWA, 33 U.S.C. § 1344, to conduct the activities described in paragraph 8, above.

18. Respondents' activities as described in paragraph 8, above, are in violation of section 301 of the CWA, 33 U.S.C. § 1311, each day that the unauthorized dredged or fill material remains in waters of the United States.

19. Mitigation for adverse impacts to waters of the United States and removal of dredged and fill material from the affected waters to a condition that closely approximates their condition prior to the discharge of dredged and fill material are achievable as a practical matter through commonly used construction, digging, filling, revegetation, and best management practices.

20. Activities to be carried out under this Order are remedial, not punitive, and are necessary to achieve the Clean Water Act's objective to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a). Removal, restoration, and stabilization as described in paragraph 19 are appropriate to alleviate actual and potential harm to water quality and wildlife habitat caused by Respondents' unpermitted activities as described in paragraph 8 above.

21. This Order was issued after consultation with the COE's Omaha District.

III. ORDER

Based upon the foregoing FINDINGS OF VIOLATION, and pursuant to the Authority vested in the Administrator of the EPA pursuant to sections 308 and 309 of the CWA, 33 U.S.C.

§§ 1318 and 1319(a), as properly delegated to the Assistant Regional Administrator of the Office of Enforcement, Compliance and Environmental Justice, EPA Region 8, it is hereby ORDERED that:

1. Respondents shall immediately terminate all discharges of dredged or fill material into waters of the United States now and in the future without prior authorization by a valid permit issued by the U.S. Army Corps of Engineers pursuant to section 404 of the CWA, 33 U.S.C.

§ 1344. This prohibition includes all mechanical land clearing, dredging, filling, grading, leveling, installation of utilities, construction, and any other activities that result in a discharge of dredged or fill material into waters of the United States.

2. Respondents shall remove all dredged and fill material that was discharged as a result of the violations identified in this Order and restore the areas impacted by those violations to their pre-impact conditions and grade, unless EPA approves otherwise.

3. Within 5 days of receiving this Order, Respondents shall inform EPA in writing of Respondents' intent to fully comply with this Order. EPA requests that Respondents meet with EPA within 14 days of issuance of this Order if there are any concerns or questions about the requirements of this Order. The scheduling of such a meeting shall not alter Respondents' responsibility to meet any of the deadlines specified in this Order unless otherwise clearly stated in a written communication to Respondents by EPA.

4. All dredged and fill material removal and restoration activities shall be conducted in accordance with an EPA-approved restoration plan prepared by a consultant experienced in stream and wetland restoration whose qualifications are acceptable to EPA. The consultant shall also directly supervise all work performed pursuant to the EPA-approved restoration plan. A

statement of the consultant's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.

5. All dredged and fill material removal and restoration activities conducted pursuant to this Order and involving the use of heavy construction equipment shall be undertaken by an equipment operator experienced in stream and wetland restoration whose qualifications are acceptable to EPA. A statement of the equipment operator's qualifications, including professional resume and business references, shall be submitted to EPA within twenty-one (21) calendar days of receipt of this Order.

6. Within seven (7) days of any disapproval of the qualifications of the consultant or equipment operator reference in paragraphs 4 and 5 of Section III of this Order, Respondents shall submit the professional resume of a qualified individual who is acceptable to EPA.

7. Within forty-five (45) calendar days of receipt of this Order, Respondents shall submit to EPA for review and comment a Restoration Plan, prepared by the consultant referenced in paragraph 4 of Section III of this Order, for removing the unauthorized dredged and fill material from the Site and restoring it to its pre-impact configuration and grade.

8. The Restoration Plan shall be prepared in accordance with "U.S. Environmental Protection Agency - Region VIII Section 404 Enforcement: General Guidelines for Removal and Restoration Plans," attached hereto as Exhibit A. In addition, the Restoration Plan shall include:

- a. A detailed work plan and schedule for all of the work to be accomplished by the Restoration Plan, including the application for any required permits, providing for completion of all aspects of the restoration work no later than sixty (60) days after EPA

approves the Restoration Plan; and

- b. Detailed professional drawings of the restoration site, including plan and profile drawings with control elevations for pre-impact conditions, current conditions, and proposed restoration conditions. Deviations between pre-impact conditions and proposed restoration conditions shall be itemized, and detailed technical justifications for such deviations shall be provided,

9. EPA will review the Restoration Plan and approve it, approve it with modifications, or reject it with comments. If EPA rejects the Restoration Plan, Respondents shall, within fifteen (15) calendar days of receipt of EPA's rejection letter, submit a revised plan that corrects the deficiencies identified by EPA.

10. Upon receiving EPA's written approval of the Restoration Plan, Respondents shall obtain all necessary permits to implement the EPA-approved plan and then commence restoration activities in accordance with the approved plan, including the time frames specified therein, and all granted permits. Respondents shall demonstrate that all necessary permits have been granted by providing complete copies of all such permits, and any amendments thereto, to EPA within seven (7) calendar days of issuance of each permit.

11. This Order is not a permit or an authorization to place or discharge dredged or fill material in waters of the United States. Respondents shall consult with the Corps at the address and telephone number below to determine if any work to be performed pursuant to this Order requires a permit from the Corps under section 404 of the CWA. If required, Respondents shall obtain such permit(s) and provide a copy to EPA pursuant to paragraph 10 of Section III of this Order prior to initiating any work that is to be performed pursuant to this Order.

U.S. Army Corps of Engineers
Helena Regulatory Office
10 West 15th Street, Suite 2200
Helena, MT 59626
Telephone: (406) 441-1375

12. Respondents shall submit three (3) copies of the Restoration Plan, all notifications, and related correspondence to:

Kristine Knutson
U.S. Environmental Protection Agency
Region 8, Montana Office
10 West 15th Street, Suite 3200
Helena, MT 59626-0096
Telephone: (406) 457-5021
Facsimile: (406) 457-5055

A copy of the Restoration Plan, all notifications, and related correspondence also shall be provided to:

Wendy Silver, 8ENF-L
U.S. Environmental Protection Agency, Region 8
999 18th Street, Suite 300
Denver, CO 80202-2466
Telephone: (303) 312-6637
Facsimile: (303) 312-6953

13. Any deliverables, plans, reports, specifications, schedules and attachments required by this Order are, upon approval by EPA, incorporated into this Order. Any non-compliance with such EPA-approved deliverables, plans, reports, specifications, schedules and attachments shall be deemed a failure to comply with this Order and may subject Respondents to further EPA enforcement action.

14. Respondents shall allow or arrange to use their best efforts to allow access by any authorized representatives of EPA or its contractors, the COE, the U.S. Fish and Wildlife

Service, and the Montana Department of Environmental Quality, upon proper presentation of credentials, to sites and records relevant to this Order for any of the following purposes:

- a. To inspect and monitor progress of the activities required by the Order;
- b. To inspect and monitor compliance with this Order; and
- c. To verify data submitted to EPA.

This Order shall in no way limit or otherwise affect EPA's authority, or the authority of any other governmental agency, to enter the site, conduct inspections, have access to records, issue notices and orders for enforcement, compliance, or abatement purposes, or monitor compliance pursuant to any statute, regulation, permit, or court order.

15. This Order shall be effective upon receipt by Respondents.

16. Please be advised that section 309(d) of the CWA, 33 U.S.C. § 1319(d), authorizes civil penalties of up to \$27,500 per day for each violation that occurred before March 15, 2004, and \$32,500 per day for each violation thereafter of section 301 of the CWA, 33 U.S.C. § 1311, and for each violation of an Order issued by the Administrator of EPA under section 309(a) of the CWA, 33 U.S.C. § 1319(a). Additionally, section 309(g) of the CWA, 33 U.S.C. § 1319(g), authorizes EPA to impose administrative penalties for violations of the CWA. Further, section 309(c) of the CWA, 33 U.S.C. § 1319(c), authorizes fines and imprisonment for willful or negligent violations of the CWA. Issuance of this Order shall not be deemed to be an election by the United States to forego any civil or criminal action to seek penalties, fines, or other appropriate relief under the CWA for violations giving rise to the Order.

17. Compliance with the terms and conditions of this Order shall not be construed to relieve Respondents of their obligation to comply with any applicable Federal, state, or local law or

regulation. Failure by Respondents to complete the tasks herein in the manner and time frame specified pursuant to this Order may subject Respondents to a civil action under section 309 of the CWA, 33 U.S.C. § 1319, for violation of this Order.

DATED this 10TH day of June, 2004

SIGNED

Carol Rushin
Assistant Regional Administrator
Office of Enforcement, Compliance
and Environmental Justice

IF YOU WOULD LIKE COPIES OF THE ATTACHMENTS, PLEASE CONTACT THE REGIONAL HEARING CLERK.

THIS DOCUMENT WAS FILED IN THE RHC'S OFFICE ON JUNE 10, 2004.